

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,  
AND IRBESARTAN PRODUCTS  
LIABILITY LITIGATION**

MDL No. 2875

Honorable Robert B. Kugler,  
District Court Judge

**This Document Relates to All Actions**

**NOTICE OF DEFENDANTS' MOTION FOR LEAVE TO FILE  
INSTANTER SURREPLY BRIEFS IN FURTHER OPPOSITION TO  
PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION, AND REQUEST  
FOR A CLASS CERTIFICATION HEARING**

**PLEASE TAKE NOTICE** that on June 21, 2022, or as soon as counsel may be heard, the undersigned counsel, on behalf of all Defendants, shall move for the entry of an Order granting Defendants' Motion for Leave to File *Instanter* Surreply Briefs in Further Opposition to Plaintiffs' Motions for Class Certification, and Request for a Class Certification Hearing.

**PLEASE TAKE FURTHER NOTICE** that in support of their motion, the Defendants shall rely upon the Brief in Support submitted herewith and exhibits thereto and any reply submissions made hereafter; and

**PLEASE TAKE FURTHER NOTICE** that a proposed Order is submitted herewith; and

**PLEASE TAKE FURTHER NOTICE** that oral argument is requested.

Dated: May 20, 2022

Respectfully Submitted:

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**IN RE: VALSARTAN, LOSARTAN,  
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LIABILITY LITIGATION**

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**This Document Relates to All Actions**

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO FILE  
INSTANTER SURREPLY BRIEFS IN FURTHER OPPOSITION  
TO PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION, AND  
REQUEST FOR A CLASS CERTIFICATION HEARING**

Pursuant to Local Civil Rules 7.1(d)(6) and 78.1(b), Defendants: (1) seek leave of the Court to file short, targeted surreply briefs to address new arguments, new authorities, and new expert and factual matters raised in Plaintiffs' reply briefs in support of their motions for class certification; and (2) request that the Court set Plaintiffs' Motions for Class Certification for a hearing. Plaintiffs have indicated that they oppose this motion.

**A. Defendants Should Be Granted Leave To File Surreplies.**

Local Civil Rule 7.1(d)(6) requires leave of the Court to file a surreply. In the class certification context, surreplies are routinely allowed where, as in this case, Plaintiffs have submitted significant new exhibits, new legal argument, and new authorities in their reply briefs, and have thereby introduced new issues into the class

certification controversy. *See, e.g., Laurens v. Volvo Cars USA, LLC*, No. 2:18-cv-08798-JMV-CLW, 2020 WL 10223641, at \*6 & n.9 (D.N.J. Dec. 8, 2020) (granting leave to file a surreply where the plaintiffs presented an argument in their reply brief in support of class certification that “was not clearly articulated in the motion for class certification and was effectively newly raised in the reply brief”); *Morgan v. Rohr, Inc.*, No. 3:20-cv-00574-GPC-AHG, 2021 WL 4806472, at \*2-3 (S.D. Cal. Oct. 14, 2021) (granting leave to file a surreply where plaintiffs submitted new “lengthy collections of evidence” and a new trial plan “as part of the reply”); *Eldridge v. Cardif Life Ins. Co.*, 266 F.R.D. 173, 175 (N.D. Ohio 2010) (granting leave to file a surreply where plaintiff’s class certification reply brief “raise[d] new arguments” relating to a newly filed “affidavit and . . . exhibits”).

The Court should allow Defendants to file narrowly-targeted surreplies pursuant to this precedent in order to address the most important new arguments, authorities, and evidence submitted by Plaintiffs for the first time in their replies, for the following reasons:

- Plaintiffs’ Reply in Further Support of Their Motion for Class Certification of Consumer Economic Loss Claims (the “Consumer Economic Loss Reply”) abandons Plaintiffs’ original Trial Plan, which proposed that “a single trial” decide “all of the Classes’ claims” in one three-phase proceeding; includes new appendices, trial plans and jury

instructions; relies heavily on new authorities and arguments never raised in Plaintiffs' opening brief; proposes a new, unprecedented (and still unworkable) three-part standard to determine the viability of Plaintiffs' proposed state law "groupings"; and misstates various state laws in attempting to argue that Defendants' state-law variation appendices are erroneous.

- With respect to the Wholesaler Defendants, the Consumer Economic Loss Reply also misstates the facts with regard to the information available to trace putative class members' VCDs to Wholesalers, relies on unsupported arguments raised for the first time on reply, and relies on newly asserted misrepresentations, misstatements, and mischaracterizations as to Dr. Conti's unjust enrichment damages calculation—most of which go far beyond what Dr. Conti herself testified to—and misrepresents the applicable caselaw regarding unjust enrichment.
- The Third-Party Payors' Reply Brief in Support of Motion for Class Certification asserts the new and novel position that this Court may certify classes based solely on rulings made at the motion to dismiss stage and urges the Court to use Rule 23 in a manner that would abridge, enlarge, or modify substantive state law rights in contravention of the

Rules Enabling Act.

- The Reply Memorandum of Law in Support of the Medical Monitoring Plaintiffs' Motion for Class Certification proposes new state law groupings based on whether the states require "present physical injury," "subcellular injury," or "no injury at all"; abandons Plaintiffs' prior medical monitoring plan as proposed by their expert, Dr. Kaplan, and instead—like the Consumer Economic Loss Reply—punts to this Court to craft an entirely different remedy after a class is certified; cites several heavily-criticized, decades-old authorities in support of certifying medical monitoring classes; seeks for the first time to bolster Plaintiffs' defective "Lifetime Cumulative Thresholds" by citing to additional general causation experts who were not referenced in Plaintiffs' opening brief; and presents 15 new exhibits in support of the foregoing new arguments.

Defendants submit *instanter*, as Exhibits 1 through 4 hereto, their proposed surreplies, each of which is short, focused, and addresses specific new evidence, arguments, and authority.

**B. The Court Should Set A Hearing On Plaintiffs' Motions For Class Certification.**

Defendants also respectfully request that the Court set Plaintiffs' Motion for Class Certification for a hearing to afford Defendants an opportunity to further

present their positions on Plaintiffs' factual submissions and legal arguments, including the new facts and arguments offered by Plaintiffs for the first time on reply. Plaintiffs are seeking certification of more than 120 subclasses collectively asserting damages alleged to be in the billions of dollars, as well as equitable relief through a decades-long monitoring program. The Court has received hundreds of pages of briefing and thousands of pages of appendices and exhibits in support of the parties' respective positions. Under these circumstances, setting a hearing on class certification will enable the parties to present their respective positions to the Court in a single proceeding, will afford the Court an opportunity to have the parties address specific controversies and questions, and will create a more complete record on which the Court may make its class certification determinations. *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 169-70 (3d Cir. 2015) (finding that district court abused its discretion by summarily adopting magistrate judge's report and recommendation on class certification, in part because "no oral argument was held on the class-certification motion" leaving the Third Circuit to "wonder why the [d]istrict [c]ourt determined" an explanation offered in opposition to the report and recommendation "was inadequate").

Specifically, Defendants propose a one-day oral argument, with each side allocated three hours to present its positions on Plaintiffs' Motions for Class Certification.

WHEREFORE, for the foregoing reasons, Defendants respectfully request that this Court enter the accompanying Proposed Order: (1) granting Defendants leave to file the accompanying Surreplies *instanter*; (2) setting Plaintiffs' Motions for Class Certification for a one-day oral argument; and (3) granting such other and further relief as the Court deems necessary or proper.

Dated: May 20, 2022

Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 20, 2022, I electronically filed the foregoing Defendants' (Proposed) Surreply in Further Opposition to Plaintiffs' Motion for Class Certification of Third-Party Payor Claims with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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